IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 651

ANCHOR STOVE & RANGE COMPANY,
Petitioner,

v.

MONTGOMERY WARD & CO., INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

STUART S. BALL,
JOHN A. BARR,
FRED T. BARRETT,
Counsel for Respondent.

Subject Index.

Table of Cases.

In The

Supreme Court of the United States

October Term, 1940.

No. 651

ANCHOR STOVE & RANGE COMPANY,

Petitioner,

v.

MONTGOMERY WARD & CO., INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The memorandum of the District Court, not reported, appears at page 12 of the record. The opinion of the Circuit Court of Appeals is reported in 114 Fed. (2d) 893, and is reprinted at page 35 of the record.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered October 14, 1940 (R. 40). The petition for a writ of certiorari was filed December 26, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

ARGUMENT.

I. The Only Question Raised By the Petition Is One That Was Not Necessary to the Decision and in Fact Was Not Decided By the Circuit Court of Appeals.

Only one question is raised by the Petition for Certiorari, the question whether or not it was error to dismiss the complaint upon its merits "without notice to plaintiff of the date of hearing of the motion, and without giving plaintiff an opportunity to be heard upon the merits of the bill" (pp. 5-6 of Petition).

The Circuit Court of Appeals, however, basing its affirmance of the District Court on the determination of two issues of substantive law which would effectively dispose of the case regardless of what procedure was followed, held that the determination of the procedural issue was not necessary to the decision.

Although by implication petitioner contends that the Circuit Court of Appeals erred in not considering the procedural issue, petitioner shows no reason either in logic or in precedent for considering a procedural question the determination of which could not possibly influence the ultimate decision in the case. This should in itself dispose of the entire Petition.

II. The Affirmance of the Decision Dismissing the Complaint Without a Hearing Is Not Inconsistent With Any Decision Cited By Petitioner.

However, should the affirmance of the District Court be considered as amounting to a holding that petitioner was not entitled to a hearing, petitioner's argument is fully answered by a brief demonstration that the decision is not inconsistent with the cases cited by petitioner.

Swift v. *Jones*, 145 Fed. 489, dealt with the impropriety of employing a special master to determine the facts in a case at law. It does not conflict with a decision denying a hearing or argument in opposition to a motion which accepted the facts stated in the complaint as true.

In re American Furnisher's Corp., 296 Fed. 605, *Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, and *In re Associated Gas & Electric Co.*, 83 Fed. (2d) 734, all dealt with the power of a District Court judge to try cases or make orders in chambers when outside the judicial district. In the instant case no hearing was held and no order was made outside the district.

Horn v. *Pere Marquette*, 151 Fed. 626, also considered whether an order appointing a receiver could properly be made in chambers. That portion of the decision is inapplicable for the reason that it does not appear from the record in this case that any hearing was held or any order made in chambers (R. 12).

Petitioner has cited no case and given no reason to show that it was entitled to a hearing on the motion to dismiss, either under rules of court or by virtue of fundamental principles of law or equity.

III. The Circuit Court of Appeals' Decision As to the Applicability of Laches Was Not Necessary to the Decision and Also Was a Determination of a Question of Local Law Not Claimed to Be Inconsistent With Decisions of the State Courts.

In disregard of the rule that this Court will consider only the questions specifically brought forward by the Petition for Certiorari (Rule 38 (2)), another question is suggested by petitioner's brief. This is that the decision of the Seventh Circuit Court of Appeals on the applicability of laches is in conflict with decisions of other Circuit Courts of Appeals. The simplest answer is that the decision of the Seventh Circuit Court of Appeals was not based on laches alone but also upon the Illinois statute of limitations, which gave an independent ground for the decision not questioned by the Petition for Certiorari.

A further answer is that the decision on the applicability of laches was a determination of a question of local law. This being a case in which the equitable relief sought is predicated upon petitioner's legal rights,[1] the Seventh Circuit was applying the law of Illinois in obedience to the decision in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. See *Russell* v. *Todd,* 309 U. S. 280, 289, and *West* v. *American Telephone and Telegraph Co.,* .... U. S. ...., decided December 9, 1940. If the different results in the cases are not in fact justified by differences in the circumstances, the conflict must be attributed to differences in the local law, uniformity between circuits not being attainable in matters of local law when the United States Courts simply apply the local law of the states in which the cases arise. No conflict with any decision of the Illinois courts is shown or claimed to exist.

---

1. See the Circuit Court of Appeals' statement that **Russell v. Todd, 309 U. S. 280,** is unavailable to the plaintiff because the remedy there was exclusively in equity: 114 Fed. (2d) at p. 895.

Conclusion.

Presumably petitioner seeks to have the case remanded to the District Court for argument on defendant's motion to dismiss. The futility of such procedure is obvious. Petitioner seeks only an opportunity to eventually present to the District Court an argument which already has been fully considered and determined in respondent's favor by the Circuit Court of Appeals. The Writ of Certiorari therefore should be denied.

Respectfully submitted,

STUART S. BALL,
JOHN A. BARR,
FRED T. BARRETT,
Counsel for Respondent.